

COURT OF APPEALS OF VIRGINIA

Record No. 1150-25-3

LORENZO TIAMZON MARSHALL
v.
COMMONWEALTH OF VIRGINIA

Present: Chief Judge Decker, Judges Raphael and White

Argued at Lexington, Virginia

Opinion Issued September 1, 2026*

FROM THE CIRCUIT COURT OF FLOYD COUNTY

K. Mike Fleenor, Jr., Judge

John S. Koehler (Jonathan Rogers; Jonathan Rogers, P.C.; The Law Office of James Steele, PLLC, on briefs), for appellant.

William K. Hamilton, Assistant Attorney General (Jay Jones, Attorney General, on brief), for appellee.

MEMORANDUM OPINION BY JUDGE KIMBERLEY SLAYTON WHITE

INTRODUCTION

Lorenzo Tiamzon Marshall, the appellant, was charged with assault and battery of a family member, in violation of Code § 18.2-57.2, and with causing cruel treatment of a child, in violation of Code § 40.1-103(A), based on his conduct toward his eleven-year-old son. After a bench trial, Marshall was acquitted of assault and battery of a family member but found guilty of causing cruel treatment. On appeal to this court, however, we reversed the conviction and remanded the case to the trial court with instructions for the trial court to apply the parental

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

privilege analysis to the causing cruel treatment charge. On remand, the trial court applied the parental privilege analysis and again found Marshall guilty of causing cruel treatment.

Marshall now appeals his conviction for causing cruel treatment of his eleven-year-old son under Code § 40.1-103(A). Specifically, on appeal, he argues that (1) when this Court reversed and remanded the case, he was entitled to a new trial; (2) because he was acquitted of assault and battery at his previous trial, the trial court was collaterally estopped from considering any physical conduct when determining whether his conduct toward his son constituted cruel treatment; and (3) the evidence was insufficient to prove the crime of causing cruel treatment under Code § 40.1-103(A). We disagree and affirm the judgment of the trial court.

BACKGROUND¹

On April 9, 2022, at approximately 8:20 a.m., the appellant, Lorenzo Tiamzon Marshall, was preparing to leave his home with his two sons, eleven-year-old L.M. and nine-year-old W.M.² They were preparing to leave the home because Marshall was scheduled to turn on the heat at the local school that morning. However, after discovering discarded medication in the trashcan, which he referred to as “gummies” or “vitamins,” Marshall called both boys into the kitchen and angrily demanded to know which of them had thrown away the medications.³ Both boys denied throwing their medications away. Marshall, becoming more frustrated, yelled, “Don’t bullshit me! I have two gummy vitamins, I have two Flintstones, and two orange ones.”

¹ On appeal, we recite the facts “in the ‘light most favorable’ to the Commonwealth, the prevailing party in the trial court.” *Hammer v. Commonwealth*, 74 Va. App. 225, 231 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)). Doing so requires us to “discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.” *Cady*, 300 Va. at 329 (quoting *Commonwealth v. Perkins*, 295 Va. 323, 324 (2018)).

² We identify the children by their initials to afford them privacy.

³ Throughout the residence, there were cameras recording the events of April 9. These recordings were played at trial and made a part of the record.

Because Marshall had seen W.M. take his medications earlier that morning, he believed L.M. likely discarded his medications. Hence, Marshall directly confronted L.M., yelling, “Don’t you dare lie to me!” L.M. responded in a very low tone and Marshall cut him off and told him, “Try again!” Before L.M. could respond, Marshall asked whether he had discarded his medications the day before. L.M. told him he could not remember, to which Marshall responded, “Don’t give me that,” and told him to “stop playing dumb with [him]!”

Once again, Marshall asked, “Whose gummies are these?” L.M. told him that he “didn’t put them in the trash” but Marshall said he did not believe him and told L.M. that he “better change [his] tone and change [his] story.” Again, L.M. denied discarding his medications. Marshall told L.M. that he knew he was lying and asked if he “want[ed] to get spanked right now?” L.M., sounding frightened, said he did not.

Marshall then charged into the laundry room and grabbed L.M.’s jacket collar under his chin, pinning him against the door between the kitchen and laundry room. While continuing to hold L.M. by the shirt, Marshall interrogated him for approximately ten minutes about whether he had discarded the medication. Marshall demanded that L.M. “confess now,” and when L.M. began to cry, Marshall told him that “the crocodile tears are not going to cut it this time.” L.M. began crying louder and begged his father to “please don’t hurt [him].” Marshall, growing more frustrated, yelled back, “Have I ever hurt you in my goddamned life? Have I ever hurt you?” L.M. continued to cry so Marshall began to mock him, yelling that L.M. was faking.

Marshall then asked W.M. whether he had discarded his gummies the previous day. Turning back to L.M., whom he still held pinned against the door, Marshall again told him to “try again.” Marshall told L.M. that he had seen W.M. take his medications that morning and therefore knew the discarded medications belonged to him. Marshall then yelled, “Stop with the

crocodile tears, stop with the being fake! Because you are being fake.” Marshall pressed harder against L.M.’s chest, causing him to cry out louder. He then told L.M. to “try again.”

Marshall continued to mock L.M. for crying, asking him why he was “whimpering like a dog.” He then asked, “How many times have you done that?” and, “If I dig through the trashcan, am I going to find more gummies?” L.M. told him he had not done that before. After that, Marshall asked him, “When are you going to learn?” Marshall kept questioning L.M. about two other prior instances and then moved within inches of his face, shook him, and repeatedly yelled in his face, “When are you going to goddamn learn?” L.M. began crying loudly. After a moment of silence, Marshall pushed him against the door and again asked, “When are you going to goddamn learn?” L.M. told Marshall that it hurt him, but Marshall refuted that.

Afterwards, Marshall grabbed L.M. by his collar, put him on the ground, and pulled him into the kitchen. He then told L.M. to “bend over” so he could spank him. While on the floor, L.M. begged Marshall not to hurt him. Marshall replied, “Have I ever hurt you in my life?” and L.M. whimpered, “Yes.” Marshall grabbed L.M. by his coat, lifted him up in the air, and shook him several times while yelling at him. He told L.M. to stop crying and repeatedly told him that he was “not hurting [him].” Then Marshall shook him hard and told him that he was “extremely pissed off!”

Marshall told L.M. that he knew the truth and asked him when he was “going to learn to stop lying.” L.M. continued to cry and begged his father not to hurt him, to which Marshall yelled, “Have I ever hurt you enough to make you bleed in your entire life?” L.M. said no and again denied placing the medication in the trash. Marshall made L.M. look him in the eyes and told L.M. he was “a smart kid, but this is the dumbest shit you try to pull on me.” When L.M. tried to avoid the spanking, Marshall grabbed him, placed him in a chokehold, lifted him off the floor, and forced him facedown onto the floor, saying, “Fine, we’ll do this the hard way.”

Marshall held L.M. down, pulled down his pants, raised his elbow above his own head, and administered three spankings to L.M.'s bare buttocks. After the third spanking, L.M. rolled over on his back crying and screaming. As L.M.'s cries grew louder and he shouted, "It hurts," Marshall then struck him across the face. L.M. looked at his father and said, "You didn't need to slap me across the face."⁴ Marshall responded that he did "because [L.M. was] being ridiculous."

Marshall then opened the laundry room door and told W.M. that it was his turn to get spanked, even though Marshall knew W.M. had not discarded the medications. Before spanking W.M., Marshall continued to mock L.M., telling him, "At least your brother is taking it like a man." Marshall continued to reprimand L.M. until he finally admitted to lying to him. Marshall called him an "idiot" for lying and told him that he "better stop right now because I'm not going to [hurt you] unless you make me. . . . But if you test my patience, I will. And you know that."

In response, L.M. began to whimper and hyperventilate, Marshall accused him of faking and told him he was "being an absolute baby." Marshall took the spray bottle off the counter, put it in L.M.'s face, and sprayed him with it, telling him to "Cool off and calm down." Marshall then told him to leave and go wash his face. Soon after, Marshall followed L.M. into the bathroom, demanded that he tell him the truth and stop crying, and accused him of putting "on a good show." He then told L.M. that if he was not faking, then he was "pretty goddamned stupid." Once L.M. returned to the kitchen, he told him that "I can only imagine what this is going to do with your mother. You put me in a really bad spot." Marshall gave him a cold press to hold against his face and told him he was trying to help him. The encounter lasted about 45 minutes.

⁴ Although the trial court found "the exact location of the fourth strike is obscured by the kitchen island," it found that Marshall "clearly strikes L.M. somewhere on his front," and "[b]ased on L.M. subsequently placing a towel on his face and the photograph of a red mark on L.M.'s left cheek," it concluded "the fourth strike most likely occurred on L.M.'s face."

Three hours after the incident, L.M.'s mother photographed the injury to his face and took him to a hospital for examination. A report of the incident was made to the county Department of Social Services, which requested an investigation by the Sheriff's Office. Shortly thereafter, Detective Rusty Stanley met with the boys and their mother and learned that the incident had been recorded by Ring cameras installed in Marshall's home. Detective Stanley subsequently obtained a search warrant for the Ring camera recordings. Following an investigation that included review of the recordings, Marshall was charged with assault and battery of a family member, in violation of Code § 18.2-57.2, and causing a child to be cruelly treated, in violation of Code § 40.1-103(A).

FIRST TRIAL

During the first trial, the parties stipulated that witnesses would describe L.M. as a "problem child" who was difficult to control, aggressive, instigated fights with peers, and had emotional struggles and difficulties following directions. As a result, he had behavioral problems in school and extracurricular activities and was diagnosed with Oppositional Defiant Disorder, Dysregulation Disorder, and Attention Deficit Hyperactivity Disorder. For treatment, L.M. was in therapy and was prescribed medication, which the family referred to as "gummies" and "vitamins."

The recordings were played during the bench trial. The trial court issued a letter opinion acquitting Marshall of assault and battery of a family member under Code § 18.2-57.2 but convicting him of causing a child to be cruelly treated in violation of Code § 40.1-103(A). In concluding that the parental privilege applied to the assault and battery charge, it found that Marshall's physical conduct such as his three spankings, the slap, and other physical contact did not cause L.M. "significant harm." Because the court found no significant harm, it weighed L.M.'s misconduct, including lying about discarding his medication, against the punishment

Marshall imposed, which included interrogating him for approximately ten minutes and demanding that he confess. After considering multiple factors under the totality of the evidence, the trial court concluded that the parental privilege exempted Marshall from criminal liability for assault and battery under Code § 18.2-57.2 and therefore acquitted him of that charge.

As to the causing cruel treatment charge under Code § 40.1-103(A), the trial court found Marshall guilty. The trial court sentenced Marshall to two years of incarceration but suspended the entire term. However, on appeal, we reversed because the trial court “failed to apply the parental privilege [analysis] to the cruel treatment . . . under Code § 40.1-103” and remanded for the trial court to perform that analysis. *Marshall v. Commonwealth*, No. 1026-23-3, slip op. at 13 (Va. Ct. App. Nov. 26, 2024).

PROCEEDINGS ON REMAND

On remand, after applying the parental privilege analysis, the trial court found Marshall guilty of felony child cruelty. In a letter opinion, the trial court found that Marshall’s “conduct clearly exceeds the bounds of reason and moderation.” Although Marshall did not use an object to strike L.M. and did not leave permanent physical injuries, the trial court concluded that his treatment of L.M. was nevertheless “a physically intense encounter.” The trial court found that Marshall, who was much larger than L.M., repeatedly berated his son, called him stupid, accused him of lying, and mocked him as he cried throughout the encounter. The trial court further found that Marshall’s conduct was “extremely physically aggressive,” noting that he pinned L.M. against a wall, screamed inches from his face, and placed him in a chokehold despite his son hyperventilating, crying, and repeatedly pleading with his father not to hurt him. The court also found that Marshall’s decision to slap L.M. across the face after spanking him demonstrated a complete disregard for whether his actions would cause injury.

Accordingly, while acknowledging that “Virginia’s adherence to the parental privilege is not to be taken lightly,” the court concluded that Marshall’s initial attempt to discipline L.M. “quickly gave way to an unfettered lack of restraint on [his] behalf.” The trial court found that Marshall’s “relentless berating of his young son was cruel” and that his “inability to control his own emotions exceeds moderation and extends into torment.” Ultimately, the trial court concluded that Marshall’s actions reflected “a lack of self-discipline on behalf of the parent” and that his “conduct was clearly excessive considering L.M.’s transgression.” As a result, the trial court found Marshall guilty and reinstated its previous conviction and sentence for cruel treatment under Code § 40.1-103(A).

The trial court also rejected Marshall’s contention that this Court’s reversal and remand entitled him to a new trial. The trial court concluded that Marshall misread this Court’s mandate, which required only that it apply the parental privilege doctrine to the existing record in determining whether Marshall was guilty for cruelly treating his son, not conducting a new trial.

On appeal, Marshall argues that the trial court erred by denying him a new trial and that the evidence was insufficient to support his conviction of cruel treatment under Code § 40.1-103(A). Additionally, Marshall contends that because he was previously acquitted of assault and battery of a family member under Code § 18.2-57.2, the parental privilege precluded the trial court from considering any physical punishment he inflicted on L.M. when determining whether he cruelly treated the child in violation of Code § 40.1-103(A).

ANALYSIS

A. Remand Interpretation

“In Virginia, an appellate mandate ‘is the directive of the appellate court certifying a judgment in a particular case to the court from which it was appealed’ and thus ‘speaks only to that case.’” *Sidya v. World Telecom Exch. Commc’ns, LLC*, 301 Va. 31, 41 (2022) (quoting

Powell v. Commonwealth, 267 Va. 107, 128 (2004)). As a result, “[a] trial judge is bound by a decision and mandate from this Court, unless we have acted outside our jurisdiction. A trial court has no discretion to disregard our lawful mandate.” *Rowe v. Rowe*, 33 Va. App. 250, 257 (2000). Thus, when an appellate court remands a case with specific instructions, the trial court must follow those instructions, and any failure to do so “constitutes reversible error.” *Id.* at 258. However, “while the directive of [the appellate court’s] mandate binds the circuit court, that court is not thereby prohibited from acting on matters not constrained by the language of the mandate, construed in light of the appellate court’s opinion.” *Powell*, 267 Va. at 128.

After we reversed and remanded the case for failing to apply the parental privilege analysis to determine whether Marshall cruelly treated his son, Marshall asserted that the remand required that he be given a new trial. According to Marshall, when a judgment is reversed on appeal, “the litigants are restored to their original rights as though no previous trial had occurred.” *Ford Motor Co. v. Jones*, 266 Va. 404, 407 (2003). Marshall is correct—unless the remand dictates differently. *See Nassif v. Bd. of Supervisors*, 231 Va. 472, 480 (1986) (explaining that “[u]nless [appellate courts] say otherwise, the slate is wiped clean, with the result that on remand the parties begin anew”). In order to do “otherwise,” appellate courts must “limit issues on remand . . . with words of limitation or restriction.” *Id.* at 480-81. Nevertheless, “a trial court must obey ‘both the letter and spirit’ of an appellate mandate.” *Sidya*, 301 Va. at 41 (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)). Accordingly, we independently examine the language of our prior opinion to determine the scope of the remand.

Marshall’s argument that once a judgment has been reversed on appeal, it returns the litigants to “status quo ante,” where a new trial can take place, is misplaced. Rather, unless the remand contains limiting language, it is assumed that the parties will start the litigation over as if the previous trial did not occur. However, the opinion Marshall relies on for the proposition that

“the litigants are restored to their original rights as though no previous trial had occurred” itself involved a case in which the Court explicitly ordered a new trial. *Ford Motor Co.*, 266 Va. at 407. Instead, the full quote states, “[a]fter a reversal of a circuit court’s judgment and *remand for a new trial*, the litigants are restored to their original rights as though no previous trial had occurred.” *Id.* (emphasis added). Because our prior opinion did not order a new trial, *Ford Motor Co.* does not support Marshall’s position.

On numerous occasions, we have explicitly stated that we are remanding for a new trial.⁵ However, our prior *Marshall* opinion contains no such language. Similarly, as in statutory interpretation, we presume that when there is “specific language in one section [of an opinion] . . . but [that opinion] omits that language from another section . . . the exclusion of the language was intentional.” *Cf. Stoots v. Marion Life Saving Crew, Inc.*, 300 Va. 354, 365 (2021). We therefore presume that the omission of any reference to a new trial was intentional.

Here, after examining the language of our remand, we conclude that our prior opinion specifically limited the remand to the trial court’s application of the parental privilege analysis to the causing cruel treatment charge under Code § 40.1-103(A). When we remanded the case, we explained that the trial court “failed to apply the parental privilege [analysis] to the cruel treatment . . . under Code § 40.1-103” and “therefore remand for [it] to perform this analysis.” *Marshall*, slip op. at 13. In our conclusion, we again held that “the parental privilege analysis must be applied to both charges, and remand for the court to consider the facts in light of this

⁵ See, e.g., *Yellock v. Commonwealth*, 79 Va. App. 627, 644 (2024) (“[W]e remand the matter to the trial court for a new trial on the lesser [offense].”); *Davis v. Commonwealth*, 68 Va. App. 725, 735 (2018) (“[W]e reverse and remand the case for retrial, if the Commonwealth be so advised.”); *Richardson v. Commonwealth*, 67 Va. App. 436, 447 (2017) (“[W]e reverse appellant’s conviction and remand the case for a new trial, if the Commonwealth be so advised.”); *Cantrell v. Commonwealth*, 65 Va. App. 53, 66 (2015) (“[W]e reverse the trial court’s denial of Cantrell’s motion to suppress . . . and remand for a new trial consistent with our analysis and holding if the Commonwealth is so advised.”).

analysis.” *Id.* at 16. Thus, construed in light of our opinion, the mandate limited the proceedings on remand to the trial court’s application of the parental privilege analysis to the cruel treatment charge under Code § 40.1-103(A).

Moreover, our decision in *Khine v. Commonwealth*, 75 Va. App. 435 (2022), illustrates that a remand following reversal does not necessarily require a new trial. There, after all the evidence had been presented, we held that the trial court applied the wrong legal standard to the defendant’s insanity defense. *Id.* at 451. Because “[t]he only question was how the trial court, sitting as the factfinder, should weigh the evidence,” we remanded for the court to reconsider the existing record under the correct standard rather than conduct a new trial. *Id.* at 452-53. *See also Edwards v. Commonwealth*, 49 Va. App. 727, 742 (2007) (finding when a trial court fails to apply the correct legal standard, the appellate court must vacate those convictions and remand the case with the instructions to apply the correct legal standard). The same is true here since all the evidence has already been presented, and our remand required the trial court only to reconsider that evidence under the parental privilege analysis it had failed to apply.

Accordingly, after examining the language of our prior opinion and the relevant precedent, we conclude that we did not remand for a new trial. Instead, we remanded the case for the limited purpose of requiring the trial court to apply the parental privilege analysis to the causing cruel treatment charge under Code § 40.1-103(A). Because our mandate neither authorized nor contemplated a new trial, the trial court correctly declined Marshall’s request to relitigate the entire case.

B. Collateral Estoppel

Marshall argues that the trial court erred in finding him guilty of cruelly treating his son under Code § 40.1-103(A) because it improperly relied on the physical aspects of his discipline of L.M. According to Marshall, the trial court’s acquittal on the assault and battery of a family

member charge under Code § 18.2-57.2 necessarily established that his corporal punishment fell within the parental privilege. He therefore contends that, because the issue was conclusively resolved in his favor, the trial court was prohibited on remand from reconsidering the physical aspects of the encounter when determining whether his conduct constituted cruel treatment under Code § 40.1-103(A).

In essence, Marshall urges that the trial court was collaterally estopped or issue precluded from considering any of his physical conduct in its cruel treatment analysis. Thus, Marshall asserts that the trial court could only consider his nonphysical conduct in determining whether he exceeded the bounds of the parental privilege and committed cruel treatment under Code § 40.1-103(A). Accordingly, he asks this Court either to reverse his conviction or remand the case for the trial court to reconsider the evidence without relying on the physical aspects of the encounter.

“Because collateral estoppel involves mixed questions of law and fact, not pure questions of law, we apply a de novo standard of review as to . . . whether collateral estoppel is applicable but we are bound by the underlying factual issues as determined by the fact finder unless they are plainly wrong or unsupported by the evidence.” *Commonwealth v. Davis*, 290 Va. 362, 368-69 (2015) (alteration in original) (quoting *Loudoun Hosp. Ctr. v. Stroube*, 50 Va. App. 478, 493 (2007)). “Collateral estoppel only applies when ‘the issue was actually and necessarily decided in the defendant’s favor’ in the prior criminal proceeding.” *Id.* at 372 (quoting *Schiro v. Farley*, 510 U.S. 222, 236 (1994)). “In a criminal context, collateral estoppel is the doctrine of issue preclusion based upon the Fifth Amendment’s protection against double jeopardy, which has been recognized as a constitutional guarantee applicable to state prosecutions.” *Id.* at 369. When a defendant asserts the defense of “collateral estoppel[,] [they] must show by a

preponderance of the evidence that the claim or issue should be precluded by the prior judgment.” *Bates v. Devers*, 214 Va. 667, 671 (1974).

According to the United States Supreme Court, collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). “A determination ranks as necessary or essential only when the final outcome hinges on it.” *Bobby v. Bies*, 556 U.S. 825, 835 (2009). When a defendant’s prior ruling rests on a general verdict of acquittal, an appellate court must ““examine the record of a prior proceeding”” to determine whether the issue the defendant seeks to preclude was an “ultimate fact” necessarily decided by the verdict. *Ashe*, 397 U.S. at 443-44 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bix Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38 (1960)). Indeed, the reviewing court must consider “the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Id.* at 444 (quoting Mayers & Yarbrough, *supra*, at 38-39).

In *Ashe*, the United States Supreme Court held that collateral estoppel barred a second prosecution because the jury in the first trial necessarily determined the “ultimate fact” that the defendant was not one of the robbers who committed the offense. 397 U.S. at 443, 445-46. Because that factual issue had been conclusively resolved in the defendant’s favor and was necessarily decided by the acquittal, the government was precluded from relitigating it in a subsequent prosecution arising from the same robbery. *Id.* at 446-47. Otherwise, allowing a second jury to convict him of robbing the poker players would have required them to reach the opposite conclusion from the first jury by finding that he was one of the robbers. *Id.* at 446.

Thus, *Ashe* illustrates that collateral estoppel precludes relitigation only of an issue of ultimate fact that was necessarily decided by the prior judgment. *Id.*

Unlike in *Ashe*, however, the assault and battery acquittal under Code § 18.2-57.2 did not necessarily determine the privileged status of Marshall's individual acts of physical conduct as discrete issues of ultimate fact. Essentially, Marshall's argument attempts to transform one evidentiary factor considered within a multi-factor analysis into an issue of ultimate fact that was necessary to the judgment. However, the United States Supreme Court rejected precisely that argument in *Bies*. 556 U.S. at 835. In *Bies*, the defendant argued that because the prior court had found him intellectually disabled when considering the mitigating circumstances for determining the death penalty, that finding was necessary to the final judgment and thus entitled to preclusive effect in a subsequent proceeding. *Id.* at 832. Nevertheless, the Court disagreed because the prior judgment imposing the death sentence did not hinge on the finding that the defendant was intellectually disabled. *Id.* at 834-35. Rather, the defendant's intellectual disability was one of several mitigating factors the jury considered in weighing the aggravating and mitigating circumstances before ultimately imposing the death penalty. *Id.* at 835. Therefore, because the death sentence did not depend on a determination that the defendant was intellectually disabled, that finding was not an issue of ultimate fact entitled to preclusive effect in the subsequent proceeding. *Id.*

Like the defendant in *Bies*, the privileged status of Marshall's individual acts of physical conduct did not constitute discrete issues of "ultimate fact" because, in the first trial, the court considered multiple factors, based on the totality of the evidence, in determining whether his conduct was protected by the parental privilege for assault and battery under Code § 18.2-57.2. Similarly, Marshall's argument "conflates a determination necessary to the bottom-line judgment with a subsidiary finding that, standing alone, is not outcome determinative." *Id.* at 835. Indeed,

the trial court considered not only Marshall's three spankings, the slap, and other physical contact, but also L.M.'s lie about throwing away his medications and Marshall's interrogation of him in determining whether Marshall's conduct remained within the bounds of the parental privilege.

The acquittal therefore necessarily resolved only the ultimate question whether, considering all of those circumstances together, the Commonwealth proved that Marshall's conduct exceeded the parental privilege. It did not establish, however, that the trial court made any particular finding regarding the privileged status of each individual spanking, the slap, or other physical contact. Had the trial court necessarily found, in acquitting Marshall, that he did not physically strike or otherwise make physical contact with L.M., issue preclusion would apply because a later judgment finding that he did would require the court to reach the opposite factual conclusion. The acquittal did not necessarily determine that Marshall never engaged in the physical conduct at issue or that each individual act was privileged. Rather, it established only that the Commonwealth failed to prove, under the totality of the circumstances, that his conduct exceeded the parental privilege for purposes of the assault and battery charge under Code § 18.2-57.2. Thus, like the subsidiary determination in *Bies*, the privileged status of Marshall's individual acts of physical conduct was part of the broader parental privilege analysis, not a discrete issue of ultimate fact necessarily decided by his acquittal. Accordingly, Marshall has failed to prove "that his subsequent felony convictions were premised on the same issue of ultimate fact that was actually and necessarily decided in his favor in the misdemeanor trial." *Davis*, 290 Va. at 372.

C. Sufficiency of Evidence

Marshall argues that the evidence was insufficient to prove that his discipline of L.M. constituted cruel treatment under Code § 40.1-103(A) because it did not endanger his life, health,

or morals, nor did it overwork, torture, torment, mutilate, beat, or cruelly treat him. Moreover, he argues that the trial court placed undue emphasis on L.M.’s reaction to the punishment rather than on Marshall’s conduct. He contends that, when assessing L.M.’s reaction, the trial court should have considered evidence that L.M. had a history of behavioral issues and had been diagnosed with several behavioral disorders.

“When reviewing the sufficiency of the evidence, ‘[t]he judgment of the trial court is presumed correct and will not be disturbed unless it is plainly wrong or without evidence to support it.’” *Eberhardt v. Commonwealth*, 74 Va. App. 23, 31 (2021) (alteration in original) (quoting *Smith v. Commonwealth*, 296 Va. 450, 460 (2018)). On appeal, when reviewing the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the Commonwealth, the prevailing party below, and all reasonable inferences. *See Mollenhauer v. Commonwealth*, 73 Va. App. 318, 333 (2021). “In such cases, ‘[t]he Court does not ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’” *Secret v. Commonwealth*, 296 Va. 204, 228 (2018) (alteration in original) (quoting *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017)). Instead, “if there is evidence to support the conviction, the reviewing court is not permitted to substitute its judgment, even if its view of the evidence might differ from the conclusions reached by the finder of fact at the trial.” *Linnon v. Commonwealth*, 287 Va. 92, 98 (2014) (quoting *Lawlor v. Commonwealth*, 285 Va. 187, 224 (2013)).

In this context, we view the “trial court’s factfinding ‘with the highest degree of appellate deference.’” *Mollenhauer*, 73 Va. App. at 333 (quoting *Whitfield v. Commonwealth*, 57 Va. App. 396, 403 (2010)). Such deference is appropriate because the trial court, sitting as fact finder, is required to impartially “resolve conflicts in the testimony, to weigh the evidence, and to

draw reasonable inferences from basic facts to ultimate facts.” *Davis v. Commonwealth*, 65 Va. App. 485, 500 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

When reviewing the evidence, our “review of the record generally ‘is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling.’” *Mollenhauer*, 73 Va. App. at 334 (quoting *Bolden v. Commonwealth*, 275 Va. 144, 147 (2008)). Instead, “[a]ppellate review requires a ‘totality-of-the-evidence analysis,’ . . . rather than a ‘fragmented assessment of the record.’” *Id.* (quoting *Commonwealth v. Moseley*, 293 Va. 455, 464, 466 (2017)). Accordingly, our review encompasses the entire record, not simply the evidence discussed by the parties or specifically referenced by the trial court, when determining whether the evidence was sufficient to prove cruel treatment under Code § 40.1-103(A).

For over a half-century, we have held that “a parent has the right to administer such reasonable and timely punishment as may be necessary to correct faults in his growing children.” *Carpenter v. Commonwealth*, 186 Va. 851, 860 (1947). “This discipline may include corporal punishment.” *Woodson v. Commonwealth*, 74 Va. App. 685, 694-95 (2022). But the Virginia Supreme Court has made clear that “[t]he right cannot be used as a [cloak] for the exercise of malevolence or the exhibition of uncontrolled passion on the part of the parent.” *Carpenter*, 186 Va. at 860. Thus, a “parent’s conduct may be unlawful if the discipline used is ‘excessive’ or ‘immoderate.’” *Eberhardt*, 74 Va. App. at 33 (quoting *Carpenter*, 186 Va. at 862).

At the same time, “[m]ere disagreement over a parent’s decision to use corporal punishment in response to a child’s particular misbehavior, without more, cannot meet this standard because it does not evince a risk of serious harm.” *Woodson*, 74 Va. App. at 699. Otherwise, “it would conflict with our clear precedent permitting reasonable corporal punishment and insulating routine parenting decisions from state scrutiny.” *Id.* Hence, “a parent

has a right to punish a child within the bounds of moderation and reason, so long as he does it for the welfare of the child.” *Carpenter*, 186 Va. at 861.

Determining the scope of parental punishment that falls “within the bounds of moderation and reason,” however, is inherently complex because “[w]ords such as ‘due,’ ‘moderate,’ ‘necessary,’ and ‘reasonable’ as applied to chastisement are ever changing according to the ideas prevailing in our minds during the period and conditions in which we live.” *Id.* at 861, 863. Nevertheless, in past cases, we have found “[w]hen there is evidence of significant harm, distinguished from transient pain or temporary minor marks, that alone shows that the parental privilege does not apply.” *Woodson*, 74 Va. App. at 699. However, “[a] lack of significant physical harm does not end the analysis.” *Id.* Instead, the factfinder must evaluate under the totality of the circumstances whether the parent’s punishment puts the child at serious risk of harm. *Id.*

In conducting that inquiry, courts must consider “the age, size and conduct of the child, the nature of his misconduct, the nature of the instrument used for punishment, and the kind of marks or wounds inflicted on the body of the child.” *Carpenter*, 186 Va. at 863; *see also Harbaugh v. Commonwealth*, 209 Va. 695, 698 (1969). “[T]he emotional state of the parent is another factor.” *Woodson*, 74 Va. App. at 696. Thus, “[t]hese circumstances could demonstrate that a child was at risk of serious harm, even if spared actual harm, and this would be enough to show that the parent’s actions were unreasonable and fell outside the privilege.” *Id.* at 699.

Marshall was convicted of violating Code § 40.1-103(A), which provides that “[i]t shall be unlawful for any person . . . having the custody of any child willfully or negligently to cause or permit . . . such child to be . . . cruelly treated.” We have explained that “the term ‘cruelly treated,’ as used in Code § 40.1-103, describes engaging in behavior toward another that causes physical *or* emotional pain *or* suffering in that other person.” *Mollenhauer*, 73 Va. App. at 335

(emphases added).⁶ “Proving cruel treatment manifestly requires evidence of less severe behavior than proving torture.” *Id.* “Absent significant [physical] harm, a factfinder may conclude that a combination of factors show[s] the child was at risk of serious harm—which still makes the discipline unreasonable.” *Woodson*, 74 Va. App. at 699. Whether a punishment by a parent is moderate or excessive is a question for the fact finder. *Eberhardt*, 74 Va. App. at 36. Thus, viewing the evidence in the light most favorable to the Commonwealth, we must determine whether the evidence was sufficient to establish that Marshall’s conduct constituted cruel treatment of L.M. under Code § 40.1-103(A).

Here, we cannot say that the trial court’s conclusion that Marshall cruelly treated his son, as proscribed by Code § 40.1-103(A), was plainly wrong or unsupported by the evidence. There is ample evidence to support the trial court’s characterization of the encounter as “physically intense” and its finding that Marshall became “extremely physically aggressive” with L.M. During the encounter, Marshall, who was significantly larger than his eleven-year-old son, stood over L.M., grabbed him by the shirt collar, and pinned him against a door. He repeatedly shook L.M., screamed inches from his face, placed him in a chokehold, and ultimately spanked him. Throughout the encounter, despite L.M.’s hyperventilating, crying, and repeated pleas for his father not to hurt him, Marshall accused him of faking his emotions, mocked him as a “whimpering dog,” and repeatedly called him stupid.

Moreover, substantial evidence supports the trial court’s finding that Marshall’s conduct exceeded the “bounds of moderation and reason.” *Eberhardt*, 74 Va. App. at 34 (quoting *Carpenter*, 186 Va. at 861). While attempting to spank L.M., Marshall lost his temper when he

⁶ While the facts in *Mollenhauer* include a mother using a different form of cruel treatment over a longer period of time than in this case, the definitions in *Mollenhauer* still stand as relevant and controlling for our analysis. *Mollenhauer* is a perfect example of how applying Code § 40.1-103 is very fact dependent and how a trial court’s findings are important in appellate review.

screamed that he was “extremely pissed off!” After he spanked L.M., Marshall slapped him across the face stating that L.M. was “being ridiculous.” While we acknowledge parents have a right to administer corporal punishment, that “right cannot be used as a [cloak] for the exercise of malevolence or the exhibition of uncontrolled passion on the part of the parent.” *Carpenter*, 186 Va. at 860. Therefore, the trial court reasonably could conclude that Marshall’s actions towards L.M. were not disciplinary measures but were expressions of his anger.

Unique in this case is the house camera evidence that allowed the trial court to witness the 45 minutes of interaction between a father and his eleven-year-old son. Over the course of 15 to 20 minutes of the video footage, Marshall struck L.M. four times, on the bottom and across the face, pinned L.M. to a door, screamed and cursed inches away from L.M.’s face, pushed L.M. into the door, shook L.M. by his collar periodically, put L.M. in a modified choke hold, tackled L.M. to the floor, and pinned L.M. to the ground. Throughout the interaction, the trial court observed the child whimper, sob, beg, and appear to hyperventilate. Accordingly, we hold that sufficient evidence supports the trial court’s determination that Marshall’s conduct exceeded the “bounds of moderation and reason” and constituted causing cruel treatment under Code § 40.1-103(A).

CONCLUSION

For the foregoing reasons, the trial court’s judgment is affirmed.

Affirmed.